

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

In the Matter of the Rehabilitation of the:

**SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION**

**Case No.: 10-CV-1576
Hon. Richard G. Niess**

**BRIEF IN SUPPORT OF THE REHABILITATOR'S
MOTION FOR INJUNCTIVE RELIEF AND
ENTRY OF A CONTEMPT ORDER**

INTRODUCTION

This Court issued a Confirmation Order on January 22, 2018. The Order contained specific findings and included Article 6.13, which applied Wisconsin law and adopted the Rehabilitator's policy position that a carefully structured Segregated Account does not constitute a default under General Account policies or related agreements. Article 6.13 also provides that, to the extent any other court declared otherwise, any such default was deemed to be cured. That provision was added to the Order to address a decision issued earlier that day by a state court in Maryland purporting to find an Ambac Default under loan documents related to a General Account policy. This Court explained that it was entering the Order and making it effective *immediately* because: "I'm concerned about what happened in Maryland, and I don't want it to happen in another state."

Notwithstanding the Court's clearly expressed intent, minutes later, one of the MHPI Projects filed a brief in Texas state court that sought to apply the Maryland decision and argued

for a ruling that Ambac was in default. Specifically, at 5:45 p.m. Central Time on January 22, Fort Bliss/White Sands Missile Range Housing LP (the “Fort Bliss Project”) filed this argument:

In its January 22, 2018 final order, the Maryland Court held - on identical facts - that there could be “no genuine dispute” that an Ambac/Credit Enhancer Default had occurred, resulting in a loss of Ambac’s consent rights. Under black letter Texas law, this judgment must be given preclusive effect as determined by Maryland law.

In doing so, the Fort Bliss Project directly contradicted the findings in the Confirmation Order and the stated intent of this Court in issuing the Confirmation Order when it did. To make matters worse, the Fort Bliss Project did not inform the Texas court of the Confirmation Order, despite that one of the attorneys listed on the Texas brief dialed-in to the Confirmation Hearing.

Wisconsin law holds that a carefully tailored Segregated Account does not trigger breaches of General Account related policies and transactions; the Segregated Account was established back in 2010 on that basis, as this Court acknowledged more than a year ago in its Order Clarifying the Scope and Nature of These Proceedings, dated October 26, 2016. The Rehabilitator carried out its statutory duties over the course of the Rehabilitation in reliance on that rule of law and then sought to exit the Segregated Account from Rehabilitation permanently pursuant to Wisconsin law and OCI’s established policy. The MHPI Projects are threatening the Rehabilitation and interfering with these Proceedings by alleging in other courts that the Segregated Account, and orders issued in connection therewith, triggered breaches related to policies in the General Account. The MHPI Projects have thus undermined this Court’s authority and have proven that they will continue to do so unless enjoined.¹ An injunctive order is now necessary to ensure compliance with the Confirmation Order.

¹ We have seen this before from these parties. The MHPI Projects served OCI with a subpoena on November 7, 2016, but without first seeking leave of court as required by this Court’s discovery procedures. (*See* April 5, 2016 Order; *see also* Jan. 20, 2017 Order.) After they refused OCI’s request to withdraw the subpoena, the Rehabilitator

FACTS

On, January 22, 2018, this Court held a Confirmation Hearing and then entered the Confirmation Order. (Jan. 22, 2018 Order.) The Court announced that the Confirmation Order was immediately effective and binding. In doing so, the Court explained that other courts, “may not fully understand Wisconsin law on rehabilitation or what we were doing here.” (Jan. 22, 2018 Hr’g Trans., p. 17:23-25.) The Court thus intended to eliminate the possibility of further orders from any other courts similar to the Order entered by the Circuit Court in Maryland, that concluded, wrongly so, that the structure of the Segregated Account caused an Ambac Default or Credit Enhancer Default, as it is referred to in some transactions. (Jan. 22, 2018 MHPI Letter² and Attachment.) The Confirmation Order thus included findings confirming that the events of this Rehabilitation Proceeding did not result in defaults under Ambac’s General Account (Jan. 22, 2018 Order, p. 4, ¶ 4(i)) and cure language to address any contrary decisions or orders, such as the decision issued by the Maryland court. (*Id.*, p. 7, ¶ 10.) The Confirmation Order, including Article 6.13 that cures any alleged breaches, is currently in effect and binds the MHPI Projects. The Court in its oral ruling made that clear to the MHPI Projects. (Jan. 22, 2018 Hr’g Trans., p. 71: 2-3).

Contrary to this Court’s stated intent, on January 22, 2018, approximately 90 minutes after the conclusion of the Confirmation Hearing, the Fort Bliss Project filed a brief in Texas arguing for application of collateral estoppel, full faith and credit, and comity to the Maryland decision without any mention of the Confirmation Order. (Spaniol Aff., pp. 1-2 ¶¶ 5-6, Exs. A-

moved to quash and for sanctions. This Court granted the Rehabilitator’s motion and awarded sanctions. (*See* Nov. 23, 2016 Order; *see also* Jan. 20, 2017 Order.) MHPI paid over \$14,000 in attorney fees on November 23, 2017, and then, remarkably on November 24, 2017, served the Rehabilitator with yet another unauthorized discovery request. That discovery request drew a motion for contempt from the Rehabilitator that was later resolved and withdrawn.

² “MHPI Letter” shall refer to the various correspondence sent from the law offices of Kravit, Hovel & Krawczyk to this Rehabilitation Court.

B.) The Fort Bliss Project did so even though their counsel, and the MHPI Projects' prior counsel here, Kirkland & Ellis³ was in attendance at the Confirmation Hearing by phone to hear the stated purpose of this Court's order. Despite the fact that the Confirmation Order was entered and effective at that time, and notwithstanding the Court's expressed concerns regarding outside proceedings, the MHPI Projects continue to press their claims of an Ambac Default/Credit Enhancer Default as though the Confirmation Order was never entered or was not intended to apply to them. (Spaniol Aff., pp. 1-2, ¶¶ 5, 8, 9, 10, Exs. A, D, E, F.)

On January 23, 2018, the Rehabilitator apprised the Rehabilitation Court that Article 6.8 provides sufficient injunctive relief and no further injunction should be needed as part of the Confirmation Order. (Jan. 23, 2018 Letter.) Then, on January 25, 2018, Ambac sent a letter to the MHPI Projects' counsel at Kirkland & Ellis advising them that the Confirmation Order is effective and binding and resolves Ambac Default arguments in all pending cases. (Spaniol Aff., p. 2, ¶ 7, Ex. C.) That should have been that.

The MHPI Projects however have concocted a self-serving and counterfactual argument that the Order is *not* binding because they are seeking "clarification" from this Court. The scheme began with MHPI Projects' letter to this Court on January 25, 2018, arguing that the Confirmation Order is not conclusive and raising a new objection, this time to Article 6.8 of the Plan. (Jan. 25, 2018 MHPI Letter.) Their January 25 letter contains the following statements:

"It wasn't this Court's intent, and it is unjust and inequitable, to have an injunction pending that prevents the MHPI Projects from fully defending themselves in those foreign courts by questioning the application and/or limits of comity, or asserting defenses of collateral estoppel and res judicata."

³ The conference call data reflects attendance by someone at the number (312) 862-2425; that telephone number is identified with Donna M. Welch of Kirkland & Ellis who was previously counsel to MHPI Projects in this case. (See Aff. of Counsel, pp. 1-2, ¶¶ 3-5, Exs. A-D.) Her appearance was withdrawn on December 13, 2017.

(Jan. 25 Letter, p. 3.) Their letter also states: “If the Court had intended to enjoin the MHPI Projects from continuing to argue its claims and affirmative defenses, it would have done so...explicitly.” (*Id.* at p. 4.)⁴

The next step in MHPI Project’s strategy was to file its January 25 letter to this Court in Texas and attempt to delay implementation there of the Confirmation Order. Specifically, on January 25, 2018, the Fort Bliss Project filed a “Motion to Abate” in the Texas case arguing that a summary judgment hearing should proceed on statute of limitations issues but be held in abeyance on the Ambac Default/Credit Enhancer Default issue because it had sought “clarification” of the Confirmation Order. (Spaniol Aff., p. 2, ¶ 8, Ex. D.) There is no rule of law that lessens the finality of a court order because a party subject to it asks for clarification. The Fort Bliss Project’s Motion to Abate, and Reply, make the following statements to the Texas court: “The parties dispute the meaning of the Wisconsin Court’s order and whether that order is entitled to deference by this Court, including under principles of comity.” (Spaniol Aff. Ex. D, p. 2, ¶ 5.) In a subsequent filing, they went further to argue:

“In its opposition, Ambac fails to address the principal basis for the Bliss Project’s Motion: that given the Rehabilitator and Ambac’s overbroad reading of the Wisconsin Court’s confirmation approval order and the Second Amended Plan, *and because the Wisconsin Court has not clarified the scope of its orders*, the Bliss Project is being prohibited from fully arguing its case.”

(Spaniol Aff. Ex. E, p. 1, ¶ 1 (emphasis added).) In fact, counsel for the Fort Bliss Project went even further to expressly misrepresent to the Texas court in a hearing on February 1, 2018 that the Order is not yet final and binding:

⁴ On January 26, 2018, the Rehabilitator filed a letter in Rehabilitation Court stating that the MHPI Projects’ objections to Article 6.8 have been waived and should be overruled. (Jan. 26, 2018 Letter.) Immediately thereafter, on January 26, 2018, counsel for the MHPI Projects responded but raised no substantive defense to waiver; rather the MHPI Projects sought only a briefing schedule and hearing, furthering their delay strategy. (Jan. 26, 2018 MHPI Letter.)

THE COURT: ... [W]ith regard to the Wisconsin ruling, that ruling came from a trial court?

MR. WILLIAN: It did.

THE COURT: It's not a final judgment?

MR. WILLIAN: It's not a final judgment yet. That's true.

(Spaniol Aff. Ex. F, p. 14:19-24.)⁵ In other words, the Fort Bliss Project misled the Texas court that the Rehabilitation Court's Confirmation Order is not final and thus could not be granted comity because it still needed to be "clarified."

In light of these facts, the Rehabilitator seeks an injunction to prevent the MHPI Projects' (i) attempts to avoid this Court's clear rulings by using these Proceedings to allege an Ambac Default or Credit Enhancer Default contrary to this Court's Confirmation Order, (ii) use of the flawed Maryland order to obtain the same decision from other courts, and (iii) misrepresentations to other courts as to the effectiveness and binding nature of the Confirmation Order. In addition, the Rehabilitator seeks a contempt finding to address the Fort Bliss Project's continued defiance of the express purpose of the Confirmation Order as stated by the Court on the record following the January 22 hearing.

ARGUMENT

I. TO PROTECT THE REHABILITATION PROCEEDINGS, A CONTEMPT FINDING IS NECESSARY TO REMEDY THE FORT BLISS PROJECT'S CONDUCT AND ARGUMENTS THAT DIRECTLY CONTRADICT THE CONFIRMATION ORDER AND SECOND AMENDED PLAN.

It is well settled that orders of the court "must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). *See also Tensfeldt v. Haberman*, 2009 WI 77, ¶ 40, 319 Wis. 2d 329, 768 N.W.2d 641 ("[A] court order or judgment must be complied with even if the

⁵ Attorney Willian is an attorney at Kirkland & Ellis who was also previously counsel to MHPI Projects in this case. (See Aff. of Counsel, p. 2, ¶ 6, Ex. D.) His appearance was withdrawn on December 13, 2017.

party—or his attorney—disagrees with the order.”). Here, the Fort Bliss Project asserted positions in the Texas case directly contrary to this Court’s Confirmation Order even as this Court was explaining on the record that it has personal jurisdiction over it, Article 6.13 was approved, and the Confirmation Order is effective when entered.⁶ It purposefully invoked the authority of the Maryland court’s decision to argue the Texas court must reach the same result, minutes after this Court ordered that any alleged breach was “cured” – effective immediately. Refusing to adhere to the Confirmation Order upon issuance merits a finding of contempt.

Further, instead of complying with the very provision of the Confirmation Order that the MHPI Projects requested (*i.e.* that it be a “final order”), the Fort Bliss Project compounded the problem by misleading the Texas court that the Confirmation Order is not final and binding because it needs to be “clarified.” It is clear however that the Confirmation Order is final and binding on all of the MHPI Projects, the Fort Bliss Project included, and effective immediately. Such disregard for the orders of this Court constitutes grounds for a finding of contempt against the Fort Bliss Project.

Wisconsin law provides that contempt sanctions may be imposed under chapter 785. Section 785.01 Wis. Stat. defines “contempt of court” in part as “[d]isobedience, resistance or obstruction of the authority, process or order of a court.” Wis. Stat. § 785.01(1)(b). Counsel for Fort Bliss Project in Texas was aware of the Confirmation Order entered by the Wisconsin Court and presumably heard the express statement of the Court’s intent in issuing the Order at the conclusion of the January 22, 2018 hearing. The Fort Bliss Project thus had “the means” required by § 785.01 to comply with the Confirmation Order immediately by simply informing

⁶ The Court stated: “my concern is, is California going to come out with a decision? Is somebody else going to come out with a decision? I’d like to enter this as a temporary order at this point and subject to further revision going forward. I’m concerned with what has happened in Maryland, and I don’t want it to happen in another state.” (Jan 22, 2018 Hr’g Trans. p. 69: 1-7.)

the Texas court of the Confirmation Order. The Fort Bliss Project was obligated to comply with the Order immediately upon its issuance, whether they agreed with it or not.

There is little doubt that the MHPI Projects generally, and the Fort Bliss Project in particular, have adopted a strategy to attempt to avoid the Confirmation Order and, in so doing, keep the issue of an Ambac Default and Credit Enhancer Default alive in other courts. Continuing to litigate the issue of default, despite this Court's clear statements on the record, and Article 6.13 that cures any such defaults, is flat-out disobedience and resistance to the Confirmation Order of this Court, and subject to contempt. *See, e.g., Yu v. Zhang*, 2001 WI App 267, 248 Wis. 2d 913, 637 N.W.2d 754 (finding party in contempt for attempting to relitigate previously decided issue).

II. A REMEDIAL SANCTION FOR CONTEMPT WILL PREVENT FURTHER ATTEMPTS TO EVADE THE COURT'S CONFIRMATION ORDER.

Section 785.04 of the Wisconsin Statutes outlines various sanctions that a court may impose for violations of the court orders and includes both remedial sanctions (imposed for the purpose of terminating a continuing contempt of court) and punitive sanctions (imposed to punish a past contempt of court for the purpose of upholding the authority of the court). Here, the Rehabilitator is seeking remedial sanctions. *See* Wis. Stat. §§ 785.04 and 785.01(2)-(3). Under Wis. Stat. § 785.04(1), a remedial sanction may include “[a]n order designed to ensure compliance with a prior order of the court.” Wis. Stat. § 785.04(1)(d); *See also City of Milwaukee v. Washington (In re Washington)*, 2006 WI App 99, ¶ 19, 292 Wis. 2d 258, 716 N.W.2d 176 (Under Wis. Stat. § 785.04(1)(d), a trial court is empowered to fashion an order to ensure compliance with a prior order.).

After being afforded notice and a full hearing on their objection to the Second Amended Plan, one of the MHPI Projects continues to file documents and make arguments contrary to the

Second Amended Plan and Confirmation Order, in this and other proceedings. This Court should issue a remedial contempt order. Specifically, the Rehabilitator requests the following findings and directives:

1. The Fort Bliss Project is in contempt of the Confirmation Order.
2. The Fort Bliss Project shall immediately file with all other courts in which it is a party to a case in which it alleges an Ambac Default and/or a Credit Enhancer Default against Ambac by virtue of the Segregated Account Rehabilitation, a copy of the Confirmation Order and the finding of contempt.

Such an order, at least, is necessary to ensure future compliance with the Confirmation Order.

III. THE MHPI PROJECTS MUST BE ENJOINED FROM ANY FURTHER VIOLATIONS OF THE REHABILITATION COURT'S ORDERS.

An injunction is necessary to protect the integrity and finality of these Proceedings. This Court has previously entered an injunction and has the power to do so now.⁷ (*See* March 24, 2010 Order) (*See also* Sept. 12, 2012 Order). The Commissioner “need not show irreparable harm or lack of an adequate remedy at law” to obtain an injunction. Rather, under Wis. Stat. § 645.05 injunctive relief is authorized to prevent the institution or further prosecution of any actions or proceedings against the insurer. This Court has the authority to issue an immediate injunction and grant a permanent injunction to prevent, among other things: (1) interference with the rehabilitation proceedings; (2) waste of the insurer’s assets; (3) the institution of actions or proceedings; and (4) “threatened or contemplated action that might lessen the value of the insurer’s assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding.” Wis. Stat. § 645.05(1)(c), (d), (f), and (k). *See Nickel v. Wells Fargo Bank*, 2013 WI App 129, ¶ 103, 351 Wis. 2d 539, 841 N.W.2d 482.

⁷ An injunction should be granted comity in other courts. *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 605 N.W.2d 210 (Ct. App. 1999) (granting comity to the injunction justified by the purposes served by state rehabilitation laws, was in the public interest and insurer entitled to protection from the rehabilitation court’s plan injunction).

As this Court explained at the January 22 hearing, the Court of Appeals' decision in *Nickel* construed the Court's injunctive authority broadly and provided clear guidance that an injunction is appropriate under the present circumstances. (Jan. 22, 2018 Hr'g Trans. pp. 56-57.) There is thus precedent in these Proceedings for the Court to issue a separate, targeted injunction. That precedent is this Court's "Order Granting the Rehabilitator's Motion To Confirm and Declare The Scope if the Relief Issued Under This Court's Prior Order for Injunctive Relief" that the Court issued in 2012. (See Sept. 12, 2012 Order.) In that Order, the Court confirmed as a result of a prior injunction that it was enjoining counterparties to RMBS Transactions from interfering with Ambac's contract rights that accompanied policies allocated to the Segregated Account. That Order and the prior injunction it confirmed were addressed on appeal in *Nickel* and specifically upheld. See *Nickel v. Wells Fargo Bank*, 841 N.W.2d 482, ¶ 145.

The MHPI Projects' instant filings in this Proceeding (see Jan. 25, 2018 MHPI Letter), and its arguments in proceedings before other courts (see generally Spaniol Aff. and Exhibits), demonstrate the need for this Court to now enter an injunction to ensure future compliance with the Confirmation Order. The relentless arguments of the MHPI Projects that the existence of the Segregated Account and the manner in which OCI chose to Finance it allegedly triggered an Ambac Default and/or Credit Enhancer Default, threaten the General Account's claims-paying ability, contrary to Wisconsin law. The MHPI Projects will undoubtedly continue to press these misleading arguments even after these Proceedings are closed, unless enjoined.

IV. THE MHPI PROJECTS HAVE WAIVED ADDITIONAL OBJECTIONS TO THE SECOND AMENDED PLAN AND CONFIRMATION ORDER; ANY FURTHER OBJECTIONS SHOULD BE ENJOINED AS WELL.

The MHPI Projects' current attempts in this Court to "clarify" the Second Amended Plan or Confirmation Order in their January 25 letter have been waived. The MHPI Projects were given notice of the Second Amended Plan and afforded 60 days to file objections. The MHPI

Projects objected only to Article 6.13 of the Second Amended Plan. The MHPI Projects' objection was thoroughly briefed and argued at the January 4, 2018 and January 22, 2018 hearings; this Court overruled the objection. Any objection to other aspects of the Second Amended Plan and the Confirmation Order have been waived. *See Nickel v. United States (In re Rehab. of Segregated Account of Ambac Assurance Corp.)*, 2012 WI 22, ¶¶ 30-31, 339 Wis. 2d 48, 810 N.W.2d 450 (finding that failure to raise issue in circuit court resulted in waiver). The MHPI Projects had their day in Court and should not be permitted to raise any further objections to the Plan.

The MHPI Projects requested that the Confirmation Order be final for purposes of appeal yet now seek a "clarification" in this Court and assert in other courts that the order is not clear. In addition to the fact that the Order is final and effective immediately, there is nothing to clarify as the Confirmation Order findings track the Ambac Default and Credit Enhancer Default language unambiguously. This Court should not entertain the MHPI Projects' continued attempt to contravene the Confirmation Order in this Rehabilitation and in outside proceedings. In fact, any further objections, letters asking for "clarification" or further motions calling into question the Plan, without leave of Court, should be prohibited.

CONCLUSION

For the foregoing reasons, the Rehabilitator respectfully requests that the Court enter the enclosed proposed order enjoining and restraining the MHPI Projects and separately enter an order of contempt with remedial sanctions against the Fort Bliss Project.

Dated at Milwaukee, Wisconsin this 7th of February, 2018.

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